INDEX.

	Page
Prayer	1
Opinions below	2
Jurisdiction	2
Statutes and rules of procedure involved	3
Questions presented	4
Statement of the case	4
Reasons for granting the writ	9
1. The decision of the Court of Appeals on a question of importance in the administration of criminal law in tax cases is in conflict with applicable decisions of this Court and other Courts of Appeals	9
2. The Court of Appeals' sanction of the trial court's charge is in conflict with decisions of other circuits and state court decisions on the same matter	12
Conclusion	16
Appendix:	
Order of District Court	17
Memorandum on petition for rehearing	19
Per curiam order of Supreme Court of United States	28
Order and judgment of the United States Court of Appeals	29-30

Cases Cited.

Bollenbach v. United States (1945), 326 U. S. 607, 612, 66 Sup. Ct. 402, 403, 90 L. Ed. 350, 354 ..... 15, 16

Bradstreet Co. v. Commissioner of Internal Revenue, 65 F. 2d 943 (CA 1, 1933) 11

Demetree v. United States, 207 F. 2d 892, 895 (5 Cir., 1953) 14
Helvering v. Taylor, 293 U. S. 507, 79 L. Ed. 623, 55 Sup. Ct. 287 ..... 11, 12
Holland v. United States, 348 U. S. 121, 99 L. Ed. 127. 12
Holt v. State (Ga., 1907), 2 Ca. Appeal 383, 58 S. E. 511 13
Lovely v. United States, 4 Cir. (1948), 169 F. 2d 386, 391 14
Marcella et al. v. Commissioner (CA-8, 1955), ... F. 2d 11
People v. Esposito (N. Y., 1918), 224 N. Y. 370, 121 N. E. 344 13
People v. Silverman (N. Y., 1937), 252 Appeal Div. 149, 297 N. Y. S. 449..... 13
Starr v. United States (1893), 153 U. S. 614, 626..... 15
Strauch v. United States, 213 F. 2d 805..... 2
U. S. v. Johnson, 319 U. S. 503, 87 L. Ed. 1546, 63 Sup. Ct. 1223 12
U. S. v. Leo J. McKenna, 126 F. Supp. 831..... 11

Statutes Cited.

Section 22, Internal Revenue Code, Title 26, U. S. C. A., § 22 10
Section 41, Internal Revenue Code, Title 26, U. S. C. A., § 41..... 11
Section 145 (b), Internal Revenue Code, Title 26, U. S. C. A., § 145 (b)..... 2, 3
Title 28, U. S. C. A., § 1254 (1)..... 2

Miscellaneous Cited.

Federal Rules of Criminal Procedure:
Rule 30 3
Rule 52 (b) 3

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

JACOB STRAUCH,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ALEX STRAUCH,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

HARRY BENJAMIN SHER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Jacob Strauch, Alex Strauch, and Harry Benjamin Sher, in these consolidated cases, pray that a writ of certiorari issue to review an order and judgment entered by the Court of Appeals for the Sixth Circuit on June 13, 1955. Said order and judgment affirmed a judgment upon which petitioners were convicted and sentenced in the District Court for the Middle District of Tennessee, upon re-examination in the light of the order of this court

entered January 10, 1955, Number 216, October Term, 1954. Under the sentence and judgment of the District Court the petitioners, Alex Strauch and Jacob Strauch, were each sentenced to three years in the penitentiary and petitioner, Harry Benjamin Sher, was sentenced to four years in the penitentiary and each of the petitioners required to pay a fine of $5,000 and costs for an alleged violation of the provisions of Title 26, Section 145 (b) of the United States Code, for the years 1944 and 1945, and in the case of Jacob Strauch the additional year of 1946.

OPINIONS BELOW.

The District Court wrote no opinion. The Court of Appeals wrote no opinion disposing of the original appeal but simply entered an order confirming the conviction. On petition to rehear, the Court of Appeals filed an opinion dated June 17, 1954, with one judge dissenting. Upon remand in the light of the order of this Court entered January 10, 1955, the Court of Appeals entered an opinion dated June 13, 1955, affirming the judgments of the District Court. The opinion of June 17, 1954, is reported **Strauch v. United States**, 213 F. 2d 805. The opinion entered June 13, 1955, has not yet been reported but may be found as an appendix to this petition.

JURISDICTION.

The judgment of the Court of Appeals was first entered on April 21, 1954, and the petition for rehearing was overruled on June 17, 1954. The second opinion of the Court of Appeals was promulgated June 13, 1955, and the judgment was entered June 13, 1955. An order for stay of mandate was entered by the Court of Appeals on June 22, 1955. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, United States Code.

STATUTES AND RULES OF PROCEDURE INVOLVED.

The petitioners were convicted for alleged violation of the provisions of Title 26, Section 145 (b) (Internal Revenue Code), which reads as follows:

> "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution (26 U. S. C., 1946 Ed., Sec. 145 (b)."

Rules 30 and 52 (b) of the Federal Rules of Criminal Procedure, which read as follows, are likewise involved:

> "Rule 30.
>
> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."
>
> "Rule 52.
>
> "(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

QUESTIONS PRESENTED.

The questions presented for review by this petition are:

1. In a criminal prosecution for income tax evasion may the government base its proof of alleged taxable income upon a method of computation which fails to follow the statutory direction required to reflect the net income clearly.

2. Was it plain error affecting the substantial rights of the defendants for the court to charge the jury that if they should find the defendants "not guilty" the government could not appeal from that verdict, and to instruct the jury on the quantum of punishment which might be meted out to the defendants if found guilty.

STATEMENT OF THE CASE.

The defendants in these three consolidated cases were indicted as follows: Jacob Strauch was indicted on three counts; the first and third counts alleged that he willfully and knowingly attempted to defeat and evade a large part of the income tax due and owing to the United States of America for the calendar years 1944 and 1946, respectively, by filing and causing to be filed false and fraudulent income tax returns. The second count in the indictment alleges:

> "That on or about the 15th day of March, 1946, in the Middle District of Tennessee, Jacob Strauch, late of Nashville, Tennessee, did willfully and knowingly attempt to defeat and evade income tax due and owing by him to the United States of America for the calendar year 1945, in the amount of $25,471.71, by willfully failing to file an income tax return for the calendar year 1945, by willfully failing to file a partnership return for the partnership, Strauch and Sher, for the calendar year 1945, by failing to keep records of his

individual business, Jacob Strauch Jewelry Company, and by attempting to conceal his income by handling most of his transactions in cash. In violation of Section 145 (b), Internal Revenue Code, 26 U. S. C., Section 145 (b)."

The indictments as to Alex Strauch and Harry Benjamin Sher each contained two counts wherein it is alleged that these defendants attempted to defeat and evade a large part of the income tax due and owing by them to the United States of America for the calendar years 1944 and 1945 by filing and causing to be filed false and fraudulent income tax returns.

The net income reported and that alleged by the Government to have been received is as follows:

	Reported	Alleged
Jacob Strauch:		
1944	$ 9,478.94	$32,012.76
1945	.....	.....
1946	16,922.27	35,000.36
Alex Strauch:		
1944	5,298.50	25,158.30
1945	4,776.50	18,785.42
Harry Sher:		
1944	2,727.69	19,760.79
1945	2,542.49	13,935.79

The government contended that the three defendants had derived income from a partnership known as Strauch and Sher, and that they had failed to report all of the income received by them through the partnership for the years 1944 and 1945. The government also contended that defendant, Jacob Strauch, had not reported all of the income derived by him from his individual business, Jacob Strauch Jewelry Company.

The three defendants were associated together as joint venturers in the wholesale and brokerage jewelry business. This venture commenced some time during the year 1943. No information returns, Form 1065, were filed by the defendants for this venture. Separate tax returns were filed by all the defendants showing receipts from a jewelry business except that Jacob Strauch filed no final return for the year 1945. He did file an estimate for that year showing a tax liability of $1,214.97.

The defendants kept a record of sales, purchases and expenditures. This record also reflected an estimate of gross profits on each individual sale (R. 89a-206a). In order to obtain merchandise it was necessary to make purchases, in part, at least, in cash (R. 102a, 417a, 418a).

In support of the income alleged in the indictment to have been received by the defendants from the jewelry business, the government computed income on the **cash basis.** Opening and closing **inventories** at the beginning and end of each taxable period **were ignored.** The government used estimated gross profits on individual sales as reflected in the defendants' books in order to compute taxable adjusted gross income and allowed certain deductible expenditures in the computation of the net income (R. 313a-314a). There was uncontradicted evidence that defendants had an inventory of merchandise and that there was a considerable decline in the value of the inventory in 1945 (R. 126a, 359a, 364a, 455a-456a); that if the inventories at the beginning and end of each taxable year were taken into account and if net income was computed on the accrual basis as required under the income tax law, the defendants had overreported their income for 1944 and 1945 (R. 443a-444a).

Neither Jacob Strauch nor Alex Strauch testified at the trial. Revenue Agent Norris testified that his "understanding" from conversations with Jacob were that he had

not reported any income from the joint venture and that Alex did report some income (R. 217a).[1]

Jacob Strauch financed the joint venture and from time to time advanced funds for merchandise for which he was later reimbursed (R. 296a-297a, 401a). On January 9, 1945, three checks were issued to cash totaling $30,000.00. The defendant, Sher, was questioned about these checks on cross-examination. He testified that the checks were issued to reimburse Jacob Strauch for merchandise which he had purchased for the joint venture. There was no evidence to the contrary (R. 400a-403a). The suppliers were identified in the check book records and some of them were present and available as witnesses for the government but were not used.[2]

The government also contended that Jacob Strauch had not reported all of his income from a separate jewelry business. This alleged additional income was computed on what was called the bank deposit—expenditures method. In computing this alleged additional income the total bank deposits were totalled for each year and to this was added cash expenditures. The computed receipts from the joint venture were eliminated as were other items of reported income in order to arrive at the alleged net income from the separate jewelry business. No consideration was given to cash on hand at the beginning of each period although the evidence was undisputed that Jacob Strauch kept large sums of cash on hand in his vault and made deposits therefrom (R. 242a, 296a-297a, 302a, 346a,

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[1] The Circuit Court in its opinion of June 13, 1955, says "Jacob Strauch and Alex Strauch admitted that they had reported none of this partnership income * * *." There is no evidence to support this statement. The testimony is as stated above.

[2] The Circuit Court in its opinion of June 13, 1955, states "that the partners actually received substantial amounts from the partnership was shown by three checks drawn January 9, 1945, to 'cash' cashed by the three partners individually, and totalling $30,000." The evidence does not support this statement by the court. See also R. 257a.

359a, 459a). No consideration was given to funds derived from the sale of inventory on hand at the beginning of any taxable year.

In an effort to bolster its bank deposit case against Jacob Strauch the government offered over objection of the defendant (R. 260a) what purported to be net worth statements dated May 13, 1940 (R. 161a-163a) and November 1, 1946 (R. 103a-104a).

Other than formal instructions relating to burden of proof, reasonable doubt, proof by circumstantial evidence, and a recitation of the charges in the indictment[3] no instructions were given by the court on the issues involved. The court stated that it was sure that the jury understood the issues after listening to the evidence and arguments of counsel (R. 487a).

The Court did instruct the jury that (R. 486a):

> "If your verdict is not guilty then that is the end of the case. The government can't appeal from that verdict by the jury. If your verdict is guilty, then of course it becomes the duty of the Court to pass sentence. • • •.
>
> "Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine him any amount from one cent to ten thou-

[3] While the court made a reference to the second count in the indictment against Jacob Strauch it actually described the third count and no instruction whatsoever was given to the jury with regard to the second count relating to the year 1945.

sand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court."

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court of Appeals on a Question of Importance in the Administration of Criminal Law in Tax Cases Is in Conflict With Applicable Decisions of This Court and Other Courts of Appeal.

The Court of Appeals for the Sixth Circuit has sanctioned the use by the government in a criminal tax prosecution of a method of computation which will not reasonably reflect taxable income. The Court has held that where the taxpayer fails to file a tax return showing the amount of opening and closing inventories the government may ignore inventories in its computation of taxable income. The Court has also held that the government may use the cash basis for reflecting annual income although the tax statute and regulations require that the income be computed under the accrual method.

The Court of Appeals recognizes that the tax statute and regulations require the use of inventories and that the accrual method be followed to clearly reflect taxable net income on an annual basis but holds that the government is not bound by these requirements where the taxpayer failed to "file inventories". The court stated that the defendants' books "revealed substantial unreported income". However, since the books were not maintained in a manner to reflect **taxable income** it is respectfully submitted

that the government may not rely upon such books to reveal unreported **taxable income.** The computation of net income of a mercantile business such as was involved in this case without the use of inventory and upon the cash basis is completely contrary to the requirements of sections 22 and 41 of the Internal Revenue Code of 1939 and the regulations issued thereunder.

Section 22 (c) of the Internal Revenue Code of 1939 states:

> "Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis * * *."

Regulations [Reg. 111, Sec. 29.22 (c) 1] issued by the Commissioner pursuant to the above section state:

> "Need of Inventory. In order to reflect the net income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase, or sale of merchandise is an income producing factor."

The same is true of the accrual method of accounting in cases where the use of inventories is required. The Commissioner's regulations (Reg. 111, Sec. 29.41-2) provide:

> "For instance, in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases or sales will correctly reflect income except an accrual method."

The taxpayer's books merely reflected an estimate of gross profit on individual sales. Without the use of opening and closing inventories it cannot be known whether or not there was an annual gross profit on sales.[4] Accordingly,

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[4] The extra-judicial admission of the defendants, submitted to effect a settlement of tax liability (Gov. Exhibit No. 18, R. 498a) was also based on these estimates and failed to take inventories into account.

the government's purported method of computing taxable income which the Court of Appeals has sanctioned in this case failed to reflect taxable income. This decision is in conflict with the requirement that the government must use a method which will clearly and fairly reflect taxable income. **Helvering v. Taylor**, 293 U. S. 507, 79 L. Ed. 623, 55 Sup. Ct. 287. In the recent case of **Marcella, et al. v. Commissioner** (CA-8, 1955), ... F. 2d ....., the Court states:

> "The Commissioner, after properly finding that taxpayer's records do not clearly reflect his net income, is authorized to compute the taxpayer's net income 'in accordance with such method as in the opinion of the Commissioner does clearly reflect the income.' 26 U. S. C. § 41. No specific alternate methods of computing net income are prescribed by statute. **Undoubtedly, the Commissioner is required to use a method which clearly and fairly reflects the taxpayers' income.**" (Emphasis supplied.)

See also **Bradstreet Co. v. Commissioner of Internal Revenue**, 65 F. 2d 943 (CA-1, 1933).

The Court of Appeals' decision is also in conflict with the decision of the United States District Court (Minn. 3rd Div.) in **U. S. v. Leo J. McKenna**, 126 F. Supp. 831, in which it was held that a computation of income of a mercantile business on the cash basis without the use of inventories would be wholly unrealistic and would not reflect a true net income.

The government must bear the burden of showing an understatement of taxable income in a criminal tax evasion case. In order to do this it must show within reason that the true net income is greater than that reported by the taxpayer. Whatever method is employed must be one which will fairly and clearly reflect net taxable income. Where this is not the case the burden of proof has not been sus-

tained because there is no basis for a determination that a tax is due.

The decisions of this Court in **United States v. Johnson,** 319 U. S. 503, 87 L. Ed. 1546, 63 Sup. Ct. 1223, and **Holland v. United States,** 348 U. S. 121, 99 L. Ed. 127, are based upon the premise that the net worth method of computation will reasonably and clearly reflect taxable income and may for that reason be used. The decision by the Sixth Circuit in this case ignores the requirement that the method employed must reflect taxable net income and justifies the government's computation on the ground that the taxpayer failed to follow the statutory requirements in maintaining adequate books and records. The effect of this decision is to shift the burden of proof to the defendant in a criminal case and requires him to come forward with evidence sufficient to reflect true net income. No such burden is imposed in a civil case. **Helvering v. Taylor,** supra, and **Holland v. United States,** supra, condemns it.

It is respectfully submitted that the decision by the Sixth Circuit Court of Appeals in this case on this point is in conflict with applicable decisions of this Court and other Courts of Appeals and should be reviewed.

II.

The Court of Appeals' Sanction of the Trial Court's Charge Is in Conflict With Decisions of Other Circuits and State Court Decisions on the Same Matter.

The trial court's instruction in this criminal case must be considered to have influenced the verdict of the jury. The jury was told that the statute imposed a fine of not more than $10,000 and a prison sentence of not more than 5 years on each count of the indictment. They were told, however, that in the event the defendants were found guilty by the jury the court was not bound to impose the maxi-

mum fine or prison sentence but that it could fine them any amount from 1¢ to $10,000 and imprison them from 1 minute to 5 years; that the amount of fine and imprisonment was left to the discretion of the court. The jury was further told that if they should find the defendants not guilty the government had no right of appeal from such a verdict. The inference was naturally left that the defendants would have the right of appeal in the event of a guilty verdict.

Remarks of trial judges in the presence of juries as to appealability or nonappealability of verdicts in criminal cases have long been held to be prejudicial. Such remarks are prejudicial because their effect is to influence the verdict of the jury. To remind the jury of the defendant's right of appeal or of the government's lack of such a right is to leave with the jury the belief that its own mistakes can be corrected on appeal; that the only mistake it might make is to acquit a defendant for in such an event there is no right of appeal. **People v. Esposito** (N. Y., 1918), 224 N. Y. 370, 121 N. E. 344; **People v. Silverman** (N. Y., 1937), 252 Appeal Div. 149, 297 N. Y. S. 449; **Holt v. State** (Ga., 1907), 2 Ga. Appeal 383, 58 S. E. 511.

District Judge Gourley, in his dissenting opinion in this case, Appendix, infra, p. 23, aptly stated the proposition as follows:

> "I believe the error below is 'plain' within the meaning of the rule, and that it affects 'substantial rights.' I can perceive nothing more substantial than to have the members of the jury, in their deliberation, consider the fact that if a verdict of not guilty is returned, no right to appeal exists on the part of the Government, and to further consider the nature or extent of the punishment that the trial court could impose in the event of a verdict of guilty.

"Criminal jurisprudence has long recognized error and inherent danger to a fair trial when a jury is charged on the subject of punishment, and certainly, even more grievous error and peril to the impartial administration of justice would exist when reference is made to the Government's inability to appeal from a verdict of not guilty. **Ryan v. United States**, 8 Cir., 99 F. 2d 864; **Demetree v. United States**, 5 Cir., 207 F. 2d 892; 23 C. J. S., § 1290 (b), page 869; Housel and Walser, 2nd Ed., Defending and Prosecuting Federal Criminal Cases.

"When instructions have been made to a jury which should not be made, it is a question of judgment whether what was said was so prejudicial as to justify a reversal where the evidence is sufficient to support the conviction.

"I cannot conceive that the instructions made by the trial judge were not considered with some weight in the determination of the guilt or innocence of the defendant."

We have been unable to locate any other Federal cases in which the appealability or nonappealability of the verdict has been referred to by the trial court in its charge to the jury.

The decision of the Sixth Circuit in this case on the matter of the minimum and maximum fines and penalties imposed by the statute as covered by the trial court in its charge to the jury is in direct conflict with **Lovely v. United States**, 4 Cir. (1948), 169 F. 2d 386, 391, and **Demetree v. United States**, 207 F. 2d 892, 895 (5 Cir., 1953).

In **Lovely v. United States**, supra, the Circuit Court said:

"And we think that error was committed to the prejudice of defendant when the jury was instructed that a person sentenced to life imprisonment was

eligible to parole after fifteen years. The jury had nothing to do with the punishment of the defendant, except that under the statute they might decide whether or not he should be given capital punishment; and to charge as to eligibility for parole after fifteen years was to becloud the issue before them and open the way to a compromise verdict. What they were to decide was whether defendant was guilty or not and, if so, whether he should be given capital punishment. Whether he should be paroled after fifteen years, if not given capital punishment, was a matter which they could not decide and which should not have been called to their attention, even though they were told at the same time that they had nothing to do with it. See Ryan v. United States, 8 Cir., 99 F. 2d 864; Coward v. Com., 164 Va. 639, 178 S. E. 797."

The Courts have long recognized the importance of the remarks and statements of trial judges as respects their influence on the jurors. In **Starr v. United States** (1893), 153 U. S. 614, 626, this Court said:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

The reasoning is even more compelling in the case of the last instructions of the court. This Court in **Bollenbach v. United States** (1945), 326 U. S. 607, 612 66 Sup. Ct. 402, 403, 90 L. Ed. 350, 354, stated:

> "* * * (J)urors are ever watchful of the words that fall from him (the trial judge). Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

The reasoning of the Court of Appeals seems to be that these errors are of little moment because of "other direct evidence supporting the verdict." However, as this Court pointed out in the **Bollenbach** case:

> "* * * (I)t may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

CONCLUSION.

For the reasons stated above, the petition for the writ of certiorari should be granted and the decision of the Court of Appeals for the Sixth Circuit, should be reversed.

Respectfully submitted,

JOHN J. HOOKER,
1106 Nashville Trust Building,
Nashville, Tennessee,

BERNARD J. LONG,
932 Pennsylvania Building,
Washington 4, D. C.,
Counsel for Petitioners.

APPENDIX.

Nos. 11,992, 11,993, 11,994

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Jacob Strauch, Appellant, v. United States of America, Appellee.	No. 11,992.
Alex Strauch, Appellant, v. United States of America, Appellee.	No. 11,993.
Harry Benjamin Sher, Appellant, v. United States of America, Appellee.	No. 11,994.

ORDER.

(Filed April 21, 1954.)

Before Allen, Circuit Judge, Starr and Gourley, District Judges.

This case came on to be heard on the record and briefs and oral argument of counsel;

And it appearing that in these cases, consolidated for trial by agreement of counsel, each case charging viola-

tions of 26 U. S. C., § 145 (b), appellant Jacob Strauch was indicted for willfully and knowingly attempting to evade income taxes for the years 1944, 1945 and 1946, and appellants Alex Strauch and Harry Benjamin Sher were indicted for wilfully and knowingly attempting to evade income taxes for the years 1944 and 1945;

And it appearing that the jury found each appellant guilty as charged in the various indictments;

And it appearing that the net worth figures introduced by the government bearing on the charge against Jacob Strauch were relevant and corroborated the government's contention that income not reported by appellant Jacob Strauch was received in the taxable years;

And it appearing that appellants made no proposition to compromise their possible civil income tax liability and that **Ecklund v. United States**, 159 Fed. (2d) 81 (C. A. 6), does not control;

And it appearing that the Restatement of Partnership Income executed by all appellants, prepared for appellants at their own request, admitted that substantial variations existed between the Restatement and the income declared by appellants as partners in their tax returns for the years involved;

And no exception being taken to the charge of the court, the verdict being supported by substantial evidence and no reversible error existing in the record;

It Is Ordered that the judgments be and they hereby are affirmed.

Approved for entry:

/s/ Florence E. Allen,
United States Circuit Judge.

Nos. 11992, 11993, 11994.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

Jacob Strauch, Appellant, v. United States of America, Appellee.	No. 11992.
Alex Strauch, Appellant, v. United States of America, Appellee.	No. 11993.
Harry Benjamin Sher, Appellant, v. United States of America, Appellee.	No. 11994.

Decided June 17, 1954.

MEMORANDUM ON PETITION FOR REHEARING.

(Filed June 17, 1954.)

Before Allen, Circuit Judge, Starr and Gourley, District Judges.

Allen, Circuit Judge. This case is before the court upon petition for rehearing. Appellants urge (1) that the court erred in not holding the **Ecklund** case, 159 Fed. (2d)

81 (C. A. 6) controlling, and (2) that the judgment should be reversed because of prejudicial error in the charge of the trial court. The question whether the statement of income filed voluntarily by the three appellants constituted an offer of compromise was fully considered in connection with the hearing and we adhere to our conclusion that **Ecklund v. United States**, supra, does not govern this controversy. Under this record the statement filed was not an offer of compromise and was admissible.

The question whether the District Court erred in charging upon the subject of the penalty provided under § 145 (b) of Title 26 U. S. C. for willful attempt to evade or defeat income taxes was not considered in the trial but was raised at the hearing by one of the members of this court. This portion of the charge was included in the general charge, was not excepted to by able counsel nor attacked by them either in brief or argument upon the hearing in this court. The majority of the court thinks that the charge, the pertinent portion of which is given in the margin,[1] was not prejudicial. We think the state-

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[1] "These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

"Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury. If your verdict is guilty, then, of course, it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.

"Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one

ment by the court, "If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury," was favorable to appellants and under the facts of this case it could not have induced a conviction. The three indictments set forth alleged income tax evasion for the taxable years, two of the appellants being charged with falsifying the income from a partnership of which all three appellants were members, and the third appellant being charged with failure to declare income from the partnership and also from an individual business which he owned. After the investigation of possible tax evasion began the three appellants voluntarily executed a statement setting forth material variations from the taxes reported by them in the taxable years and concerning these variations made the following statement:

> "This statement executed by Harry B. Sher, Alex Strauch and Jacob Strauch this 12th day of December, 1949:
>
> "Having re-examined, at the request of my counsel and auditors, the books and records of Strauch & Sher, a partnership, and having, pursuant to request, re-examined supporting memoranda with reference to sales and expenditures of the said partnership.
>
> "It is the opinion and belief of the undersigned that a corrected statement of income of the said partnership is properly reflected in the exhibit hereto at-

---

cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court."

tached, entitled 'Restatement of Partnership Income,' and that taxable income of the undersigned should be appropriately computed as a result of the said restatement:

"Further, that the variations resulting from the totals reflecting in the said restatement from the income as reported by the individuals, or as set forth in explanatory comments heretofore submitted are attributable to error in maintenance of records and the classification of items of income and expense and are not attributable to intent on the part of the undersigned to defraud the government, or willfully, to evade the payment of any income taxes as and when due.

"This statement has been prepared at our request in conformance with information furnished by ourselves.

"/s/ Harry B. Sher,
/s/ Alex Strauch,
/s/ Jacob Strauch."

It was shown by this statement and the records of the partnership that all three appellants in the years 1944 to 1946, inclusive, received income on which they failed to pay a tax. The bank deposits of Jacob Strauch showed that he had received income in 1944, 1945 and 1946 from an individual jewelry business on which he did not pay a tax. The evidence upon these points was overwhelming. In the face of this evidence, much of it taken from appellants' own books of account, the jury found appellants guilty. We see nothing in the court's statement which can be construed as asking the jury to convict, and in addition we cannot conceive that under this record this portion of the court's instructions could have influenced the jury as to conviction. The lack of exception by experienced counsel and the total failure to argue at the hearing in this court the point now stressed strongly in-

dicates that the error of the trial court, which is not to be commended, was not prejudicial. None of the cases relied upon are in point. In **Lovely v. United States**, 169 Fed. (2d) 386 (C. A. 4), serious error to the prejudice of the defendant was committed in the admission of testimony. Also the court in explaining that the sentence carried a life penalty stated that the defendant was eligible to parole after fifteen years. In **Demetree v. United States**, 207 Fed. (2d) 892 (C. A. 5), the jury repeatedly reported that it was unable to agree upon a verdict and finally asked the judge to state what the punishment would be. The judge assured the jury that the maximum sentence would not be imposed. These cases afford no assistance in solving the problem presented here.

The majority of the court concludes that, as no prejudicial error existed in the conduct of the trial nor in the charge of the court, **the petition for rehearing must be denied.**

DISSENTING OPINION.

Gourley, District Judge. In these criminal appeals from a jury verdict of guilty, I joined in a per curiam order affirming the judgments of the District Court since I believed substantial evidence existed to support the verdicts. I was also of the opinion, and continue to so believe, that no error existed in the record to which objection was made or exception taken. There was no basis to sustain any of the assignments of error presented by the defendants in their appeal.

Nevertheless, during the argument of the appeal, I noticed what I considered "plain error" in the charge of the trial judge which I believed affected substantial rights of the defendants.

The following portion of the District Judge's charge to the jury, in my judgment, poignantly poses the question of "plain error."

> "These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> "Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. **If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury.** If your verdict is guilty, then of course it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.
>
> "Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine

him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court" (R. 485-486).

The question of plain or substantial error was not argued and counsel for the litigants were not prepared to enlighten the court on applicable principles of law.

Opportunity has now existed for an independent research and more reflected judgment to be made of the law, and I am now convinced that substantial or plain error does exist which materially affected the rights of the defendants.

I must, therefore, vacate my joinder in the per curiam order of affirmation and respectfully dissent to the judgment of my learned colleagues.

It is incumbent upon this court to take notice of substantial or plain error, whether or not such error was raised by counsel at time of trial or laid as an assignment of error in appeal.

The law provides an impenetrable cloak of protection about a defendant in a criminal proceeding which requires the court of appeals, in cases of serious criminal offenses to carefully check the record for error prejudicial to defendant, whether such error had been urged upon the court or not. **Tatum v. United States**, 3 Cir., 190 F. 2d 612.

Undoubtedly, as a matter of administrative policy, to avoid any unnecessary appeals and new trials, it is important that errors, which inevitably will occur from time to time in extemporaneous charges of the most competent

judges, be pointed out immediately by trial counsel with a view to their correction then and there. That policy is enforced in many cases by refusal to review for defects in a charge not challenged at the trial. Indeed, the silence of counsel often suggests that errors seem trivial at that time. But where, particularly in a criminal case, several errors appear, which in the aggregate contain the potential of substantial damage to the accused, the policy of sound and time saving trial administration which would penalize failure to point out error below may have to yield to more important considerations of making sure that the accused has been treated fairly. **United States v. Cumberland**, 3 Cir., 200 F. 2d 609; **Miller v. Commonwealth of Ky.**, 6 Cir., 40 F. 2d 820; **Morris v. United States**, 9 Cir., 156 F. 2d 525; **United States v. Raub**, 7 Cir., 177 F. 2d 312; **Logan v. United States**, 5 Cir., 192 F. 2d 388; **Wyche v. United States**, CCA D. D., 193 F. 2d 703; **Apodaca v. United States**, 10 Cir., 188 F. 2d 932; **Rose v. United States**, 10 Cir., 128 F. 2d 622; **Remmer v. United States**, 9 Cir., 205 F. 2d 277.

Thus, the question is resolved as to whether the error committed was of so fundamental a nature that the court of appeals should exercise the power provided by Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.

I believe the error below is "plain" within the meaning of the rule, and that it affects "substantial rights." I can perceive nothing more substantial than to have the members of the jury, in their deliberation, consider the fact that if a verdict of not guilty is returned, no right to appeal exists on the part of the Government, and to further consider the nature or extent of the punishment that the trial court could impose in the event of a verdict of guilty.

Criminal jurisprudence has long recognized error and inherent danger to a fair trial when a jury is charged on

the subject of punishment, and certainly, even more grievous error and peril to the impartial administration of justice would exist when reference is made to the Government's inability to appeal from a verdict of not guilty. **Ryan v. United States**, 8 Cir., 99 F. 2d 864; **Demetree v. United States**, 5 Cir., 207 F. 2d 892; 23 C. J. S,. § 1290 (b), page 869; Housel and Walser, 2nd Ed., Defending and Prosecuting Federal Criminal Cases.

When instructions have been made to a jury which should not be made, it is a question of judgment whether what was said was so prejudicial as to justify a reversal where the evidence is sufficient to support the conviction.

I cannot conceive that the instructions made by the trial judge were not considered with some weight in the determination of the guilt or innocence of the defendant.

The administration of criminal justice in this democracy should not be subjected to the remotest hazard that a person be deprived of his liberty on any thoughts or ideas that do not relate directly to the facts as presented to establish a defendant's guilt.

I, therefore, respectfully dissent from the judgment of my distinguished colleagues and believe that a new trial should be awarded and the proceeding remanded to the District Court.

Since the formulation of the within dissent, defendants have made application to the court for rehearing and for the reasons herein stated, I believe rehearing should be granted.

Office of the Clerk
SUPREME COURT OF THE UNITED STATES
Washington 13, D. C.

January 10, 1955.

Re: Strauch v. U. S. No. 216, Oct. Term, 1954.

Dear Sir:

The Court today entered the following order in the above entitled cases:

"**Per Curiam**: The petitions for certiorari and for rehearing are respectively granted. The judgments are vacated and the cases are remanded to their respective Courts of Appeals for consideration in the light of **Holland v. United States, Friedberg v. United States, Smith v. United States**, and **United States v. Calderon**, decided by this Court, December 6, 1954.

We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, supra, believing that **re-examination** by the Courts of Appeals **is desirable even in those cases remotely involving the principles laid down in the net worth decisions.**

Mr. Justice Black dissents."

Yours truly,

HAROLD B. WILLEY, Clerk,
By s/ E. P. CULLINAN,
Assistant.

EPC: tw
MORRIS L. STRAUCH, Esquire,
Memphis, Tennessee.

Order Reassigning Cases for Rehearing Upon Remand From the Supreme Court.

Filed February 15, 1955.

Upon consideration of the certified copy of the judgment entered in the Supreme Court of the United States on January 10, 1955,

It Is Ordered that these cases be set for reargument at the April, 1955, session of this court.

It Is Further Ordered that the appellants be granted until March 15, 1955 to file printed copies of a supplemental brief, and that the appellee be allowed until April 15, 1955, to file printed copies of its brief in response thereto.

Causes Argued and Submitted.

April 26, 1955—Before Simons, Allen, and McAllister, Circuit Judges.

These causes are argued by Bernard J. Long for appellants and by Marvin E. Frankel for appellee and are submitted to the court.

Judgment.

Case No. 11,992.

Filed June 13, 1955.

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on remand from the Supreme Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Judgment.

Case No. 11,993.

Filed June 13, 1955.

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on remand from the Supreme Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Judgment.

Case No. 11,994.

Filed June 13, 1955.

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on remand from the Supreme Court of the United States and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion.

Filed June 13, 1955.

Nos. 11992, 11993, 11994.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Jacob Strauch,
Appellant,
No. 11992 v.
United States of America,
Appellee,

Alex Strauch,
Appellant,
No. 11993 v.
United States of America,
Appellee.

Harry Benjamin Sher,
Appellant,
No. 11994 v.
United States of America,
Appellee.

On Remand from the Supreme Court of the United States.

Decided June 13, 1955.

Before Simons, Chief Judge; Allen and McAllister, Circuit Judges.

Allen, Circuit Judge. The judgments in these consolidated cases, **Strauch v. United States**, 213 Fed. (2d) 805,

were vacated by the Supreme Court of the United States in its order of January 10, 1955, and remanded to this court for re-examination in light of the opinions of the United States Supreme Court in **Holland v. United States**, 348 U. S. 121; **Friedberg v. United States**, 348 U. S. 142; **Smith v. United States**, 348 U. S. 147, and **United States v. Calderon**, 348 U. S. 160.

Examination has been made of the record and contentions of counsel in light of the above decisions and in each case the court adheres to its original conclusion. While testimony was introduced under the net worth method against Jacob Strauch and under the bank deposit method as to all three defendants,[1] in each case ample independent evidence was presented sustaining the convictions.

Jacob Strauch was charged with evasion of income taxes in an indictment which contained three counts covering the taxable years 1944, 1945, and 1946. The jury found him guilty under all three counts and the separate sentences under each count were ordered to run concurrently. Alex Strauch and Harry Sher were each charged in an indictment containing two counts covering the taxable years of 1944 and 1945. Each defendant was found guilty under both counts and the separate sentences imposed under each count were ordered to run concurrently. If the conviction under any one count is valid as to each defendant, the sentence must be sustained.

During all the period involved Jacob Strauch conducted a wholesale jewelry business of his own and also was a member of the partnership of Strauch & Sher, the other two members being Alex Strauch and Harry Sher. Strauch and Sher conducted a wholesale jewelry business from 1943 to 1946. The government presented evidence to the effect that the partnership made profits of over

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[1] In order to avoid confusion the defendants will be denominated by their individual names.

$100,000 during this period and all three partners in a written statement executed December 12, 1949, declared that the taxable income of the partnership during this period was over $90,000. During the entire period of the partnership it filed no return of partnership income. Jacob Strauch filed no return for 1944 showing income from the partnership, and filed no return whatever for 1945.

As to Count I in the indictment against Jacob Strauch, which covers the calendar year of 1944, the government showed by direct evidence taken from the partnership books that $19,859.80 was received by Jacob Strauch from the partnership in 1944. The balance of unreported income for this year, $2,674.02, was proved by the bank deposit method. For this year of 1944 Jacob Strauch reported income of $9,478.94.

Count II of the indictment against Jacob Strauch charges willful evasion of income tax in 1946, by willful failure to file income tax return for 1945. Jacob Strauch's net taxable income for the year 1945 was shown to be $49,018.91. Of this amount $14,008.93 was proved by direct evidence taken from the books of the partnership and some $800.00 by proof of Jacob Strauch's income from dividends and capital gains.

The balance of $34,159.98 was proved by reconstructing Jacob Strauch's gross income from his sole business on the bank deposit method allowing deductions for cost of goods sold and expenses as shown by Jacob Strauch's records, cancelled checks, and other evidence.

As to Count II of the indictment Jacob Strauch contends that since he filed no income tax return for 1945 he merely omitted an act required under the statute, namely, the filing of a return, and cannot rightly be found guilty of fraudulent evasion of income tax. However, ample evidence of affirmative, fraudulent acts was presented justifying the verdict as to Count II. Jacob Strauch made

false statements to agents investigating the case, declaring that there were no books or records of the partnership, that these records were periodically destroyed. They were, however, in existence and formed the basis of the reconstruction of the partnership net income for the years involved of from $90,000 to $100,000. Jacob Strauch kept no books in his individual business, handling most of his transactions in cash. He was a partner in a firm which filed no return. He filed a declaration of estimated tax for 1945 in the amount of $1,214.97, although the correct liability was about $25,000.

As to the evidence under Count III the computation of Strauch's unreported income for 1946 was made up from an analysis of his bank deposits. He reported $16,922.27. The additional amount estimated was $18,078.09. Jacob Strauch told the investigator that the origin of his bank deposits was "receipts from the sale of jewelry" in the form of checks and cash going directly into the bank account or first put in his safe and then deposited in the bank. He stated that no money constituting non-business receipts such as gifts, insurance proceeds, or prior accumulations of money went into the bank account. The deposits during 1946 were made at regular intervals, never less than 5 and never more than 11 in one month. The government agent carefully eliminated from the estimate the proceeds of loans, of capital transactions, deposits representing income from interest and dividends, and amounts drawn from the partnership. Between 1939 and 1949 Jacob Strauch made loans at his bank totalling $8,000. In 1940 he filed a financial statement with the bank, listing a total net worth of $29,039. In 1942 he reported net income of $4,420.38 and in 1943, $5,218.36, yet in 1944 and 1945 his bank deposits were about $106,000 in excess of reported gross income. These circumstances constituted substantial independent evidence sustaining the government's estimate based upon bank deposits.

On November 7, 1946, Jacob Strauch made a sworn statement that his net worth for the taxable year ended November 1, 1946, was $113,043.99. The pattern of Strauch's accounts and his course of conduct during the period involved entitled the jury to take into consideration his admission as to net worth in connection with other evidence as to amounts of unreported income presented by the government. These circumstances corroborate the admissions of Jacob Strauch and his statements that his bank deposits reflected income. **United States v. Calderon**, supra, 168; **Smith v. United States**, supra, 158, 159.

The convictions of Alex Strauch and Harry Sher each involved charges of evasion of income tax with reference to the years 1944 and 1945, for which years no partnership return was ever made. The written statement heretofore referred to made by the partners December 12, 1949, listed in detail the total receipts of partnership income for the taxable years together with the total expenses and costs of sales. This statement with its calculation of over $90,000 profit for the years 1943 to 1946 was corroborated in every essential by the books of the partnership. By defendants' written admission about 90% of the profits of the enterprise was realized in 1944 and 1945. The books which were made up *ante litem motam* fully corroborated the admissions. **Warszower v. United States**, 312 U. S. 342.

The government agent testified that "some five" sets of books, single entry journals, which listed sales and expenditures of the partnership were used in calculating the net earnings of the partnership during the taxable years. No books recording capital accounts or distribution of profits were found. For 1945 there was a book marked "Diamond Book," and another book which covered watches, watch bands, etc. The book of expenditures covered both overhead and purchases. The records of

purchases were given up to August 19, 1946, and the records of sales were kept until November 7, 1945. It was admitted that these books showed gross profits on each transaction except in occasional cases where no profit was made. Sher stated to the investigator that there was an oral agreement that the profits should be divided equally. He kept the books and both he and an expert accountant witness for defense testified to the effect that the books were accurate.

The unreported income of the three partners was estimated from the books as follows:

Partner	1944	1945
Jacob Strauch	$19,859.80	$14,008.93
Alex Strauch	19,859.80	14,008.92
Harry Sher	17,033.10	11,390.30

The government arrived at its estimate of income from the partnership by totalling the entries for gross profits and subtracting all the allowable business expenses, for 1944 and 1945, the profit for these years being found to be $59,579.39 and $42,026.77, respectively. The estimate of the government was relatively close to the statement signed by the partners, which figured income for 1944 at $63,958.97, and for 1945 at $26,398.22. Jacob Strauch and Alex Strauch admitted that they had reported none of this partnership income and Sher reported only $2,326.69 in 1944 and $2,115.62 in 1945. That the partners actually received substantial amounts from the partnership was shown by three checks drawn January 9, 1945, to "cash" cashed by the three partners individaully, and totalling $30,000.

The contention that the evidence of unreported partnership income was not admissible because the government used defendants' accounting system instead of making inventories has no merit. Section 22(c) of the In-

ternal Revenue Code of 1939, 26 U. S. C., Section 22(c), provides that, whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income. Regulation 111, Section 29.22(c)-1 of the applicable regulations isued by the Commissioner states that, in order to reflect the net income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor.

Under this statute and regulation the Commissioner had a discretionary authority to require the taxpayer to take inventories. We are cited to no section of the statute nor to any regulation requiring the Commissioner to take an inventory and, as a practical matter, only the taxpayer can take an inventory. Here the taxpayer took no inventories. Defendants in effect contend that, because defendants failed in their duty to keep proper records, merely recording gross sales and expenses, the government cannot prove fraudulent evasion of income tax from defendants' own books and accounts. The purpose of inventories, as stated in **Lucas v. Kansas City Structural Steel Co.**, 281 U. S. 261, 268, "is to assign to each period its profits and losses." In this case Justice Brandeis observed that whether in a particular business inventories are necessary for the determination of income is a question left by the statute to the judgment of the Commissioner. The **Lucas** case held that the taxpayer should have taken inventories. But here the books disclosed the gross profits on each sale which had a profit and disclosed instances where there was no profit. They also disclosed

the complete expense of operation and thus assigned to each year its profits and losses. Under 26 U. S. C., Section 41, the method of accounting regularly employed in keeping the books of the taxpayer is to be the basis of the computation of the net income. This section was complied with in the computations herein.

We are cited to no decision in which a judgment for evasion of income tax was reversed because the taxpayer failed to file inventories, and the government in establishing income which was shown to have been received in substantial amounts employed taxpayers' own books, which correctly showed gross profits, made proper deductions for all expenses and revealed substantial unreported income.

We deem it unnecessary to discuss other questions previously raised before this court, given extensive consideration on application for rehearing, and not covered by the doctrine of the **Holland, Friedberg, Smith,** and **Calderon** cases.

The trial judge charged the jury at considerable length upon issues presented. Defendants' two special requests were allowed and, on being given the opportunity to make further requests at the conclusion of the charge, able counsel failed to take advantage of the opportunity. In view of the uncontradicted evidence of the books and other direct evidence supporting the verdict, we conclude that no prejudice resulted from the charge and that no reversible error is shown. We adhere to our conclusion originally announced that the verdicts of the jury are sustained by overwhelming evidence. The government proved by testimony independent of the statements used in evidence a consistent pattern of underreporting large amounts of income and of defendants' failure to include all of their income in their books and records. **Holland v. United States,** supra, 139. Independent evidence was

shown of the likely source of unreported taxable income. **Holland v. United States,** supra, 138. The independent evidence fortified the truth of the admissions made. The tax returns and the failure to make returns corroborated the admissions. **Smith v. United States,** supra. The general history of defendants during the taxable years provided sufficient independent evidence of the crime of tax evasion to corroborate their written statements. **United States v. Calderon,** supra.

The judgments of the District Court are affirmed.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	8
Conclusion	13

CITATIONS

Cases:	
Friedberg v. *United States*, 348 U. S. 142	2
Helvering v. *Taylor*, 293 U. S. 507	12
Holland v. *United States*, 348 U. S. 121	2
Marcella v. *Commissioner*, decided June 1, 1955	12
Smith v. *United States*, 348 U. S. 147	2
United States v. *Bender*, 218 F. 2d 869, certiorari denied, 349 U. S. 920	11
United States v. *Calderon*, 348 U. S. 160	2
United States v. *Hornstein*, 176 F. 2d 217	11
United States v. *Johnson*, 319 U. S. 503	9
United States v. *Stayback*, 212 F. 2d 313, certiorari denied, 348 U. S. 911	11
United States v. *McKenna*, 126 F. Supp. 831	12
Warszower v. *United States*, 312 U. S. 342	10
Statutes:	
Internal Revenue Code of 1939:	
Sec. 41 (26 U. S. C. 1952 ed., Sec. 41)	13
Sec. 145 (26 U. S. C. 1952 ed., Sec. 145)	3
Miscellaneous:	
2 Mertens, *Law of Federal Income Taxation* (1954 Cum. Pocket Supp.), Sec. 16.28	12
Treasury Regulations 111, Sec. 29.22 (c)–2	12

354160—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 219

JACOB STRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ALEX STRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

HARRY BENJAMIN SHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original *per curiam* order of the Court of Appeals affirming the judgment of the District Court and the memorandum and dissenting opinion on petition for rehearing (Pet. 17–27) are

reported at 213 F. 2d 805. The *per curium* order of this Court (Pet. 28) vacating the judgment and remanding the cause to the Court of Appeals for consideration in light of the net worth cases decided December 6, 1954,[1] is reported at 348 U. S. 905. The opinion of the Court of Appeals reaffirming the judgment of the District Court (Pet. 31–39) is not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered June 13, 1955 (Pet. 29–30), and the petition for a writ of certiorari was filed on July 11, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the sufficiency of the evidence of unreported partnership income was impaired by the fact that the Government followed the accounting system petitioners themselves used in keeping their books, showing the gross profit on each sale and not considering inventories as such.

2. Whether the trial court, in instructing the jury, committed plain error affecting the petitioners' substantial rights.

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[1] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; *United States* v. *Calderon*, 348 U. S. 160.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

In view of petitioners' abandonment of two of the three questions presented by their first petition for certiorari (No. 215, October Term, 1954) and their raising in the present petition of a question not presented there, relating to the sufficiency of the evidence of unreported partnership income, we believe that a restatement of the facts is desirable. All three petitioners were indicted on April 2, 1951, in the Middle District of Ten-

nessee for wilful attempted evasion of their individual income taxes for 1944 and 1945, petitioner Jacob Strauch also being charged with that offense for 1946. (R. 5–10.) The amounts of net income and taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Jacob Strauch:				
Count I (1944)	$9,478.94	$2,392.21	$32,012.76	$14,793.29
Count II (1945)				25,471.71
Count III (1946)	16,922.27	4,905.30	35,000.36	14,986.47
Alex Strauch:				
Count I (1944)	5,298.50	1,061.57	25,158.30	10,393.15
Count II (1945)	4,776.50	919.13	18,785.42	6,641.27
Harry Sher:				
Count I (1944)	2,727.69	452.00	19,760.79	7,446.04
Count II (1945)	2,542.49	410.00	13,935.79	4,420.46

After a jury trial, petitioners were found guilty on all counts. (R. 488.) Alex and Jacob Strauch were fined $5,000 and sentenced to three years' imprisonment on each count, the sentences to run concurrently, while Sher was fined $5,000 and sentenced to four years' imprisonment on each count, the sentences to run concurrently. (R. 493–494.)

Petitioners were partners in a wholesale jewelry business known as Strauch and Sher from 1943 until 1946. (R. 81–82, 90, 346–349.) During the entire period of its existence, the firm never filed partnership returns of income (R. 115) although periodic distributions of profits were made to the

three partners in equal shares (R. 90, 216, 256–259, 397–404). They dealt largely in the black market and a great deal of their business was transacted in currency. (R. 102, 139, 155–156, 177, 404, 417–418.) Petitioners maintained no books or records relating to inventories or to their capital or drawing accounts. (R. 207, 317.) Records of purchases and sales were kept until November 7, 1945, and after that only purchases were recorded, the last entries being on August 19, 1946. (R. 88–93, 395–396.) All three of the partners admitted to the agent that the figures in the far right-hand column of the sales book represented the gross profit on each transaction (R. 89, 205–206), and that the items in the expenditures book marked with an X represented overhead expenses as distinguished from merchandise purchases (R. 90, 207). The accuracy of these books was testified to at the trial by petitioner Sher, who had done most of the bookkeeping, and by an expert accountant called as a defense witness. (R. 351–353, 412, 451.)

The Treasury agent totaled the 1944 gross profit entries ($69,131.99) and the estimated gross profit on small cash sales not recorded in the sales book ($328.42), and subtracted all of the allowable business expenses ($9,881.02), arriving at a 1944 net profit for the partnership of $59,579.39. He totaled the 1945 gross profit entries ($48,583.99), added the estimated gross profit on small cash sales not recorded in the sales book

($1,786.05), deducted the allowable business expenses ($8,343.27), and determined the 1945 partnership net profit to be $42,026.77. (R. 210–216.) When Jacob and Alex Strauch were confronted with these figures from their own books they admitted that they had not reported any of this income. (R. 217.) While Alex later claimed that he had reported some of it (R. 217) it did not appear on his returns (Govt. Exs. 3 and 4). Sher reported $2,326.69 of this income in 1944 and $2,115.62 in 1945. (R. 218–223, Govt. Exs. 5 and 6.)

Since all profits were divided equally among the three partners, the agent computed their unreported income (eliminating for Sher the small amounts he had reported) from this enterprise as follows (R. 216–227):

Partner	1944	1945
Jacob Strauch	$19,859.80	$14,008.93
Alex Strauch	19,859.80	14,008.93
Harry Sher	17,083.10	11,393.30

There was evidence of large cash distributions to the partners which either did not appear on the books or had been entered as expenditures. Thus, on January 9, 1945, three checks to cash were drawn in odd amounts but totalling exactly $30,000. They were not entered in the book recording expenditures, although according to the checks and the stubs they represented payments

for merchandise which had been purchased by the partnership.[2] The checks were cashed by the partners. (R. 256–259, 400–404.) There were other similar instances. (R. 389–400.)

In December, 1949, over three years after the revenue agent had begun his investigation,[3] petitioners' attorneys, in an effort to settle the civil tax liabilities, submitted a "Restatement of Partnership Income" for the period from 1943 to 1946, inclusive. (R. 387–389, 496–498). The document was signed by all of the petitioners and contained the following language (R. 497):

> It is the opinion and belief of the undersigned that a *corrected statement of income* of the said partnership is *properly reflected* in the exhibit hereto attached * * * and that *taxable income* of the undersigned should be *appropriately computed* as a result of the said restatement * * *. [Emphasis supplied.]

The restatement disclosed corrected net profits of the partnership of $63,958.97 for 1944 and $26,398.22 for 1945. (R. 498.) This was computed by petitioners' representatives from the partnership books (R. 343–344), and petitioner Sher testified at the trial that it was a true statement (R. 389–390).

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[2] Sher, who kept the books, testified that all purchases were recorded therein. (R. 351, 417.)

[3] The investigation was begun in September, 1946. (R. 99, 330–331.)

The unreported income proved against Sher and Alex Strauch consisted entirely of their distributive shares of the income of the partnership,[4] but a substantial part of Jacob Strauch's unreported income (i. e., the portion apparently attributable to his sole proprietorship) was proved by the bank deposits method, the sufficiency and propriety of which are unchallenged in the present petition. (R. 227–228, 236–251, 266–267, 269–270, 296–297, 300–304.)

ARGUMENT

1. Petitioners contend (Pet. 9–12) that the evidence of unreported income from the partnership is insufficient because (a) it was computed on the cash basis of accounting rather than the accrual basis, and (b) it did not take inventories into account. In view of the fact that two of the petitioners reported no income, and the third practically none, from what was obviously a prosperous business, these contentions border on the frivolous.

(a) The contention that the Government used the cash basis was never raised until petitioners filed their second brief on the merits in the Court of Appeals, 23 months after the trial. Indeed, petitioners' contention at the trial was the precise opposite, *viz.*, that the Government had com-

[4] The statement in the Court of Appeals' second opinion (Pet. 32) that "testimony was introduced * * * under the bank deposit method as to all three defendants" is erroneous.

puted partnership income on the accrual method (R. 449, 460–461) and that this was improper because petitioners were being charged with income they had not actually received (R. 319). There was a conflict in the testimony as to whether the firm's books (and hence the Government's computations) were maintained on the cash or accrual method,[5] and it is clear that under the facts of this case the point is wholly insubstantial. The Government need not prove the exact amount of unreported income. *United States* v. *Johnson,* 319 U. S. 503, 517. Here the record left no doubt of large unreported profits in 1944 and 1945. The partnership was formed in 1943 and dissolved in 1946. (R. 347–349). By November 7, 1945, business had fallen off so badly because of the ending of World War II that sales were no longer recorded in the book. (R. 93, 350.) By petitioners' own written admission (R. 496–498), made in December, 1949, about 90% of the total net profits of the enterprise were realized in 1944 and 1945. These admissions were fully corroborated by the books,

[5] Petitioners' expert accountant testified (R. 449, 460–461) that the sales books which the Government used in arriving at total gross profits were maintained on the accrual method. This opinion was apparently based on Sher's testimony (R. 410) that the gross profit on each sale was recorded on the books at the time of the sale. The Government agent, who had been told in his discussions with petitioners that the gross profit entries were recorded at the time payment was received, testified that the books (and, hence, his computations) were on the cash method. (R. 205–206, 313, 315, 317.)

which, being admissions *ante litem motam,* require no corroboration. *Warszower* v. *United States,* 312 U. S. 342. The Court of Appeals was fully justified in stating (Pet. 38), "We adhere to our conclusion originally announced that the verdicts of the jury are sustained by overwhelming evidence."

(b) The second part of petitioners' contention is that their books, and hence the Government's computations, "failed to reflect taxable income" (Pet. 11) because opening and closing inventories were not accounted for. It is clear that the authorities cited for this position (Pet. 10–11) do not apply to the facts of this case. It is true that the Government did not take inventories as such into account, and equally true that it did not take sales and purchases as such into account. (R. 314.) As the agent explained (R. 313–317), there was no need to take them into account separately because the books disclosed the gross profit on each sale.[6] The function served by inventories in the computation of income concerns the determination of the cost of goods sold, but here the cost of each lot of merchandise was known and reflected in the gross profit recorded on the books.

[6] Petitioners' statement that the books "merely reflected an estimate of gross profit on individual sales" (Pet. 10) is incorrect. As we have shown, *supra* (p. 5), all three of the petitioners admitted to the agent that the figures represented actual gross profit, and the accuracy of those figures was attested to at the trial by petitioner Sher and by the expert accountant called by the defense.

(R. 313–316.) The expert accountant called by the defense conceded that computation of income by this "gross profit method" without the use of inventories is an "accepted practice." (R. 453, 461–462.)

Although the present contention was not raised in the first petition for certiorari (No. 215, October Term, 1954), the main defense theory at the trial was that petitioners were entitled to a deduction from their 1945 profits on account of a sharp decline in the market value of the closing inventory for that year. This merchandise, it was said, consisted of cheap jewelry which was sold mainly to post exchanges at army camps, and for which the market dried up suddenly with the end of World War II. The contention was fully presented to the jury (R. 313–317, 336–345, 349–350, 359–365, 432–444, 449–458, 469–471) and was resolved against petitioners. Clearly, it presented a question of fact,[1] for petitioners maintained no inventory records whatever. (R. 317.) *United States* v. *Hornstein,* 176 F. 2d 217 (C. A. 7th); *United States* v. *Stayback,* 212 F. 2d 313 (C. A. 3d), certiorari denied, 348 U. S. 911; *United States* v. *Bender,* 218 F. 2d 869 (C. A. 7th), certiorari denied, 349 U. S. 920. Moreover,

[1] It should be noted that in the "Restatement of Partnership Income" submitted to the Government three years after the investigation began some $90,000 of taxable income earned in 1944 and 1945 was admitted and no mention was made of any loss suffered from the depreciation of inventory. (R. 496–498.)

even if petitioners had suffered the kind of paper loss claimed at the trial, it would not have been deductible for income tax purposes. Treasury Regulations 111, promulgated under the Internal Revenue Code, Sec. 29.22 (c)–2; 2 Mertens, *Law of Federal Income Taxation* (1954 Cum. Pocket Supp.), Sec. 16.28. Under these circumstances the Government could not properly have taken inventories into account even if the matter had been called to its attention before the trial, and even if the amounts could have been determined.

There is no conflict between the instant decision and the cases cited by petitioners. (Pet. 11.) *Helvering* v. *Taylor,* 293 U. S. 507, 511–512, involved only the extent of the burden resting upon a taxpayer in a civil proceeding to establish the correct tax, once he has shown the Commissioner's determination to be arbitrary and excessive. *Marcella* v. *Commissioner* (C. A. 8th), decided June 1, 1955 (1955 C. C. H., par. 9482), holds that the Commissioner erred in not crediting the taxpayer with the proceeds of bank loans when computing his income on the expenditures method, the taxpayer's books being totally inadequate.[8] Plainly, these cases have no application to the situation here where the books showed the

[8] Petitioners also assert a conflict with *United States* v. *McKenna*, 126 F. Supp. 831 (D. Minn.), where it was held that the Government had properly computed income on the accrual method. That case did not hold that the conviction would have to be reversed if the cash method had been used. Moreover, petitioners err in stating (Pet. 9) that the court

true income but the petitioners simply failed to report it.

2. Petitioners renew their contention with respect to alleged errors in the court's instructions to the jury. (Pet. 12–16.) The lack of substance in this contention was sufficiently demonstrated in our original brief in opposition in this case (No. 215, October Term, 1954, pp. 12–14), to which the Court is respectfully referred.

CONCLUSION

For the reasons stated in the Government's original brief in opposition as well as those appearing above, it is submitted that the decision of the court below is correct. No conflict of decisions is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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below "held that the government may use the cash basis for reflecting annual income." The court held only that the Government had complied with Section 41, Internal Revenue Code of 1939, which provides that the net income shall be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. (Pet. 38.)

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